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No.

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IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES A. THOMAS,

Petitioner

v.

GENERAL SERVICES ADMINISTRATION

and

MERIT SYSTEMS PROTECTION BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Where the Merit Systems Protection Board incorrectly held that it did not have jurisdiction over petitioner's appeal from a suspension from his federal employment and thus did not reach petitioner's defenses, did the Federal Circuit err in ordering the suspension affirmed without any review of petitioner's defenses when it held the Board had jurisdiction?

2. Did the Federal Circuit below err in holding that substantial evidence supported the Merit Board's findings where those findings were based on written hearsay statements that were recanted at the hearing by their authors?

3. Where petitioner was suspended from his federal employment pending a decision on his employing agency's application for his involuntary retirement, does the Backpay Act require that he be awarded his full compensation for the suspension

period when the application for involuntary retirement is denied?

PARTIES IN THE UNITED STATES COURT OF APPEALS

Charles A. Thomas, petitioner herein, filed as petitioner in a Petition for Review in the United States Court of Appeals for the Federal Circuit. His petition named the Merit Systems Protection Board and General Service Administration as respondents. The court below referred only to General Services Administration as respondent.

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FOR THE FEDERAL CIRCUIT

The petitioner, Charles A. Thomas, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in this proceeding on March 4, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 756 F.2d 86. The opinion and order of the Merit Systems Protection Board is not officially reported; it is unofficially reported at 1984 Fed. Mer. Sys. Rep. para. 84-5391. The initial decision of the Merit Board is not reported. The opinion of the court below, the opinion and order of the Merit Board and the initial decision of the Merit Board are set out in the Appendix hereto.

JURISDICTIONAL STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals entered on March 4, 1985. A timely petition for rehearing or rehearing en banc was denied by the Court of Appeals on April 5, 1985. The jurisdiction of this Court is invoked pursuant to U.S.C. s 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the due process

clause of the Fifth Amendment to the United States Constitution, and the following statutory provisions which are set out in the Appendix hereto: 5 U.S.C. §§ 2302(b), 5596(b)(1), 7513(b), 7701(c), 7703.

STATEMENT OF THE CASE

Petitioner, Charles A. Thomas, was a federal employee from 1968. He was first an archivist trainee and later a journeyman archivist with the General Services Administration (hereinafter, GSA) National Archives in Washington, D.C. In 1976, he made public disclosures about a series of issues, most importantly about what he considered the alteration of materials and evidence presented to the Scranton Commission investigating the 1970 deaths of students at Kent State University. A number of employment difficulties arose for him after that which culminated in his transfer to GSA's Philadelphia Regional Office as the Training

Officer for the Federal Protective Service in March, 1980. His outspokenness in Washington was well-known to the people at his Philadelphia office.

In Philadelphia, he became concerned about other problems. He criticized what he considered unsubstantiated adverse actions against Federal Protective Officers. In addition, he had reason to believe that some guards provided by private security companies under contracts with GSA to guard federal installations were ineffective, had criminal records and were seriously lacking in training. He also questioned the quality of training provided to Federal Protective Officers. Petitioner tried to discuss his concerns with his supervisors, but he was ignored. Finally, on January 18, 1982, petitioner reported his concerns about the adverse actions and the security guards to the Inspector General of GSA.

Almost immediately thereafter, a series

of actions commenced that culminated in the instant case. On January 22, 1982, John MacDonald, a supervisor of petitioner whom petitioner named in the Inspector General letter, imposed a one-day suspension on petitioner for "insubordination" alleged to have occurred earlier. On January 26, 1982, MacDonald sent petitioner a record of infraction, recommending petitioner's removal for preparing training materials that were part of petitioner's official function. No further action was taken on that notice, but on January 29, 1982, a disciplinary panel of GSA convened. Although the panel believed that petitioner should have been removed, it decided to require a psychiatric fitness-for-duty examination and attempt to secure his involuntary retirement. In February, 1982, John Thompson, Regional Director of the Federal Protective Service and petitioner's supervisor, asked his staff to document "unusual behavior" on petitioner's part.

Thereafter, three memoranda were prepared by other supervisors in the office on April 7, 1982.

In March and April, 1982, petitioner met with Zigmond M. Lebensohn, M.D., for his fitness-for-duty examination. On May 3, 1982, Dr. Lebensohn issued his "Psychiatric Evaluation" of petitioner; he diagnosed petitioner as having a paranoid personality disorder, but made no recommendation as to petitioner's fitness for duty. The report, although some eleven pages in length, was replete with internal contradictions. For example, it stated that it was impossible to obtain any accurate data from petitioner, although the report included pages of petitioner's history related by him. It concluded that he was without tender or sentimental feelings, but it also noted petitioner's concern for his father's health and petitioner's apology for having to cancel a meeting with Lebensohn. The report was also full of

conclusory statements, for example that petitioner would tend to avoid blame when warranted and that he would tend to retaliate against people he thought were adversaries. There was no support in the report for those or similar statements. According to expert testimony in the record, the diagnosis of paranoid personality disorder is a highly subjective one.

John Thompson decided to apply for petitioner's involuntary disability retirement based on the psychiatric report. GSA applied to the Office of Personnel Management (hereinafter OPM) for that determination. On May 18, 1982, Thompson notified petitioner that he placed him on enforced sick leave and involuntary leave. On May 27, 1982, Thompson also served advance notice of intent to suspend petitioner indefinitely, pending the decision by OPM on the disability application. Although the notice stated that it was to take effect

in no less than thirty days, petitioner was already involuntarily out of the office, having been placed on enforced leave ten days earlier.

The advance notice of suspension claimed that the "specific reasons" for it were

> Your behavior has had an adverse impact on productivity and morale. Those employees affected the most by your actions are your co-workers. Their fears are based on your bizarre behavior, specifically, your constant display of a preoccupation with the martial arts, including your display of martial acts on vending machines in the building. You have also been observed on numerous occasions pointing a realistic replica of a .45 caliber revolver at various members of the staff and directing comments such as, "this is even too good for her," while slashing a cardboard box with a pair of scissors. Your constant staring, argumentative nature, preoccupation with the martial arts, revolutionary statements and practicing sight alignment with your replica revolver perpetuates fears in your fellow workers and has affected the efficiency and morale of your co-workers.

The final notice of suspension relied upon the reasons set out in the advance

notice.

Petitioner appealed the suspension to the Merit Systems Board (hereinafter, the Merit Board or the Board) pursuant to 5 U.S.C. § 7701(a). He denied that any of his actions or statements posed a threat to anyone. He also claimed that there were procedural defects in the suspension in that the advance notice was not properly specific and that it denied him his right to continue working until a final decision, that the suspension was in reprisal for his whistle-blowing, and that he was being punished for activities protected by the First Amendment. After three days of hearings, a presiding official of the Merit Board held that GSA had failed to prove, by a preponderance of the evidence, that petitioner was a threat to anyone and reversed the suspension. She found that he was a whistleblower, but that petitioner had failed to prove that the suspension was in reprisal for his activities.

She did not reach the procedural issues petitioner raised.

At about the same time that the presiding official rendered her initial decision, OPM denied the application for petitioner's involuntary disability retirement on March 11, 1983. On June 20, 1983, OPM denied GSA's request for reconsideration. OPM considered essentially the same evidence that was adduced at the Merit Board on the suspension appeal, and concluded that petitioner's ". . . psychiatric condition is not, on its face, incompatible with continued useful service and retention in the regional training specialist position he now holds with the Federal Protective Service." GSA did not seek review of that determination.

Both sides sought review of the presiding official's initial decision by the full Merit Board. The Board held that the evidence adduced at the hearing showed that

petitioner did present a threat. It held that he was not suspended and therefore that it did not have jurisdiction over the appeal. The Board relied heavily on the hearsay psychiatric fitness-for-duty report. It ignored the internal inconsistencies of the report and the fact that its conclusions were not supported. It also ignored the fact that even that report took no position on petitioner's fitness for duty. The Board also ignored the lengthy live testimony of a psychiatrist, Dr. Richard Lonsdorf, and the report submitted by a psychologist, Dr. Anthony Pisa. Both Dr. Lonsdorf and Dr. Pisa asserted that petitioner had no mental disability and that there was no reason to consider him threatening.

The Board also held, overruling the presiding official's findings, that the evidence established " . . . several incidents illustrative of appellant's inappropriate, disruptive, and threatening behavior in

the workplace." First, it relied upon a memorandum of a co-employee that stated that petitioner told her he would be a leader of a revolution that would begin soon and that she and other supervisors in the office would be victims of bloodshed. The Board, relying on that hearsay memorandum, ignored the fact that the author of the memorandum testified at the hearing that petitioner's reference to a revolutionary group was about a "philosophical group" that did not exist, that petitioner suggested no time frame for the "revolution" and that he did not state that he intended to harm anyone.

The Board also relied on a hearsay memorandum submitted by a secretary in the office, stating that petitioner had cut a box with scissors and said "even this is too good for her. He was referring to a fellow female employee." The secretary testified on cross-examination that petitioner never said who "her" was, that it could have been Marie

Antoinette or even a cat. The secretary, based on nothing from petitioner, concluded that the reference was to a fellow employee. Petitioner denied that the incident occurred.

The Board also found that petitioner telephoned the same secretary and told her that he could come into the office, kill everyone and return to work because he could plead insanity. The alleged telephone call took place after the advance notice of suspension, and it was not referred to as a ground for suspension in the final notice. The principal evidence memorializing the call was a memorandum written by Thompson, not the secretary, which purported only to paraphrase the substance of the call. Petitioner denied making the call.

Finally, the Board relied upon a hearsay memorandum submitted by another employee in the office, John Ramos, stating that he had seen petitioner executing martial arts movements in the office. There is no

evidence that anyone was placed in fear because petitioner showed an interest in martial arts. The Board also found "Mr. Ramos also reported that appellant periodically aimed a realistic replica of a pistol that he kept in his desk at co-workers' heads." Ramos' memorandum referred to a "toy/mock pistol." The memorandum stated that Ramos observed that petitioner "periodically 'plays' with it, i.e., holding, fondling and pointing it in the direction of others." No evidence, in the Ramos memorandum or elsewhere, establishes that petitioner "aimed" the toy "at co-workers' heads," as the Merit Board found. There is no evidence that anyone believed the toy gun was real or felt threatened by it. Petitioner explained his use of the toy gun as necessary for him to understand the skills required of Federal Protective Officers as to their use of firearms..

Petitioner sought timely review in the

United States Court of Appeals for the Federal Circuit pursuant to 5 U.S.C. S 7703(b)(1). On March 4, 1985, that court reversed the Merit Board on the jurisdictional issue and held that petitioner was suspended and that the Board had jurisdiction over his appeal. Nevertheless, it held that the facts showed that petitioner presented a threat and that the suspension was properly imposed. In its review, the Federal Circuit found that the Board "summarized the testimony of and memoranda written by Thomas' co-workers -- all of which were found to be credible by the presiding official . . . ." The Board, however, had failed to acknowledge the admissions made by the witnesses who wrote memoranda. (Ramos did not testify.) The presiding official did not find them all credible, and expressly made judgments based upon her observation of the demeanor of the witnesses. Without itself evaluating the record, the court below held that sub-

stantial evidence supported the findings. The Federal Circuit denied petitioner's timely Petition for Rehearing or Rehearing En Banc on April 5, 1985. Neither the full Board nor the Federal Circuit has ever ruled on the affirmative defenses advanced by petitioner.

REASONS FOR ALLOWANCE OF THE WRIT

1. THE ACTION OF THE COURT BELOW FORECLOSES PETITIONER FROM ADMINISTRATIVE AND JUDICIAL REVIEW OF STATUTORY AND CONSTITUTIONAL DEFENSES TO HIS SUSPENSION FROM EMPLOYMENT.

The Civil Service Reform Act of 1978 requires that, in an adverse action, the agency must establish grounds for the action by a preponderance of the evidence. 5 U.S.C. §7701(c)(1)(B). Here, the presiding official found that the agency, GSA, had not met its burden as to its claims against petitioner. When the Board reversed on the basis of jurisdiction, it did not evaluate that decision to determine whether

the preponderance of the evidence supported GSA's claims. Indeed, it could not have done that, because that inquiry would be appropriate only once it agreed that it had jurisdiction. Accordingly, the only ruling as to whether the agency has met its burden is that of the presiding official, holding that it did not. As a result of the decisions of the Board and the court below, petitioner has effectively been deprived of his statutory right to have charges against him established by a preponderance of the evidence.

Central to the reforms intended in the Civil Service Reform Act of 1978 is protection for whistleblowers. Among other protections, Congress explicitly provided that, even if an agency makes out the elements to justify an adverse action, the action must not be sustained if the employee can prove that the action was nevertheless taken in reprisal for whistleblowing

activities. See U.S.C §§ 7701(c)(2)(B); 2302(b).

Petitioner also claimed that the suspension was in reprisal for protected speech and therefore barred by the First Amendment. See Pickering v. Bd. of Educ., 391 U.S. 563 (1968). And he asserted that procedural irregularities in the imposition of the suspension invalidated the suspension. The statute provides that an adverse action may not be sustained, even if the agency proves its case, if there was harmful procedural error. See 5 U.S.C. § 7701(c)(2)(A). Petitioner claimed that the advance notice lacked the specificity required by 5 U.S.C. § 7513(b)(1). The lack of specificity (the notice accused him of, inter alia, "staring, an argumentative nature, preoccupation with the martial arts, revolutionary statements") deprived him of the advance notice required by both the statute and due process.

See Cleveland Bd. of Educ. v. Loudermill, -U.S.-, 105 S.Ct. 1487 (1985). And he claimed that he had been unlawfully placed on enforced leave before the advance notice, thus depriving him of his right under 5 U.S.C. § 7513(b)(1) to continue in his employment during the 30 days' notice period.

The presiding official acknowledged the prohibited personnel practice and the First Amendment defenses, albeit holding against petitioner. Petitioner raised all those defenses again in seeking review of the presiding official's decision. The Merit Board expressly did not reach contentions other than as to its jurisdiction when it vacated the presiding official's initial decision. See Appendix at 25a, n. 3. In briefs and argument to the court below, petitioner made it clear that his defenses had not yet been ruled upon by the Merit Board and that remand to the Board would be appropriate once the court held that the

Board had jurisdiction. Nevertheless, the Federal Circuit affirmed the suspension on the merits without even acknowledging that petitioner had claimed affirmative defenses which the full Merit Board had not reached. Petitioner raised again the presence of defenses in his petition for rehearing or rehearing en banc. The Federal Circuit summarily denied that petition.

Once the jurisdictional issue was resolved, petitioner was entitled to full Board and judicial review of his defenses. He has been denied that opportunity and has thus been deprived of his clear statutory right to have those defenses determined. Moreover, the failure to permit him to have an adjudication on those defenses constitutes a denial of due process of law. See Lindsey v. Normet, 405 U.S. 56 (1972); Griffin v. Illinois, 351 U.S. 12 (1956).

The issue thus presented is of major importance in the administration of the rights granted to federal employees by the Civil Service Reform Act, the First Amendment and the due process clause. If the decision below were to stand, an erroneous decision by the Board on its jurisdiction could be reversed with the Federal Circuit being permitted to affirm the action against an employee without any consideration of the defenses authorized by the statute and the Constitution. In this case, and in any similar case to follow, the Federal Circuit has effectively repealed the provisions of the Act granting employees defenses. Petitioner may not seek an adjudication of his claims that his supervisors acted illegally in instituting the adverse action against him other than through the Merit Board appellate process. See Bush v. Lucas, 462 U.S. 367 (1983). If

the decision below is permitted to stand, that forum will remain closed to him leaving him without remedy for his claim of violation of well established rights.

2. REBUTTED HEARSAY STATEMENTS AND HEARSAY STATEMENTS RECANTED BY THEIR AUTHORS CANNOT CONSTITUTE SUBSTANTIAL EVIDENCE.

The statute sets out the substantial evidence test as applicable on judicial review of Merit Board cases. See 5 U.S.C. § 7703(c)(3). The court below purported to rule on the basis of substantial evidence, but it did not evaluate the evidence. Had it done so, it would have found that the Board relied selectively on unreliable hearsay and ignored the admissions of the authors on the hearsay statements. The statute creating the Merit Board and the right to appeal to it is silent as to whether traditional rules of evidence should apply. In that event, the Board has no authority to

dispense with the requirement of the right of confrontation and cross-examination as to all evidence presented. See Greene v. McElroy, 360 U.S. 474 (1959); Vitarelli v. Seaton, 359 U.S. 535 (1959). Petitioner had a property right in his continued employment with GSA; that right could be defeated only in accordance with due process procedural protections. See Arnett v. Kennedy, 416 U.S. 134 (1974). Where loss of income is involved, due process requires the opportunity to confront and cross-examine adverse witnesses. Goldberg v. Kelly, 397 U.S. 254 (1970); Willner v. Committee on Character and Fitness, 373 U. S. 96 (1963). In the instant case, the Merit Board relied almost exclusively on hearsay to find the "facts" against petitioner. That reliance denied petitioner due process.

Even if hearsay were properly admissible before the Board, that would not

" . . . justify orders without a basis in evidence having a rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence." Consolidated Edison Co. v. Nat'l Labor Relations Bd., 305 U.S. 197, 230 (1938). Substantial evidence ". . . means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. at 219. See also, Consolo v. Fed. Maritime Comm'n, 383 U.S. 607 (1966).

In upholding the facts found to show that petitioner constituted a threat, the Federal Circuit ignored the established definitions of substantial evidence. When the author of a memorandum testifies and recants important elements of the content of the memorandum, the memorandum cannot constitute substantial evidence. Indeed, in such a situation, there is no evidence to support the allegations, and the conclusions of the Board and the Federal Circuit,

without an evidentiary basis, constitute denials of due process of law. See Thompson v. City of Louisville, 362 U.S. 199 (1960). Further, the Board found that petitioner pointed the toy gun at co-workers' heads, with nothing in the record to support that conclusion. Indeed, whatever petitioner did with the toy gun, no live or hearsay evidence provides a basis for finding that anyone was put in fear as a result.

The factual findings implicate serious issues as to petitioner. After OPM denied the disability application, GSA noticed petitioner's removal, proceeding on essentially the same allegations as it did in the suspension action. Petitioner appealed to the Board. On August 30, 1984, the presiding official reversed the removal, holding again that GSA had not proven the allegations by a preponderance of the evidence. On April 29, 1985, the full Board

reversed, deciding that the doctrine of collateral estoppel required that the facts established in the suspension appeal would apply in the removal. (Charles A. Thomas v. General Services Administration, MSPB, No. PH07528310635.) That ruling is now on appeal to the Federal Circuit (No. 85-). While it is not directly involved in the instant petition, it makes clear that the mis-reading of the record by the Board and the court below in the suspension case may result in even more loss to petitioner than the 13-month suspension he suffered. Because the facts have been applied to his removal, he has been left unemployed and falsely branded as a dangerous person.

3. THE BACKPAY ACT REQUIRES THAT PETITIONER BE AFFORDED RELIEF.

Petitioner was suspended pending a determination by OPM of GSA's application for his involuntary psychiatric disability. OPM denied that request on

March 11, 1983. OPM, based on much of the same evidence adduced before the Merit Board, found that petitioner was not disabled. (The regulations permitting involuntary disability retirement in the absence of a simultaneous removal of the employee were subsequently repealed by OPM, which noted that federal agencies had abused the earlier provisions utilized against petitioner. See 49 Fed. Reg. 1321, 1327, 1328 (Jan. 11, 1984); 48 Fed. Reg. 30401-30402 (July 1, 1983).)

Petitioner claimed before the Federal Circuit that, separate from the merits of his appeal, he was, at a minimum, entitled to backpay once OPM denied the disability application. The Backpay Act provides that an employee is entitled to backpay if an "appropriate authority" finds that he has been "affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or

part of the pay, allowances, or differentials of the employee. . ." 5 U.S.C. § 5596(b)(1). This Court has noted that the Act extends ". . . the right to backpay and lost benefits to every employee affected by a personnel action subsequently found to be unjustified . . . ." Bush v. Lucas, 462 U.S. 367, 385 n.25 (1983).

In this case, petitioner was deprived of his pay because GSA believed that he was suffering from a psychiatric disability. The effect of OPM's ruling is that GSA was mistaken. In such situations, § 5596 requires that backpay be granted by an "appropriate authority." The Federal Circuit is an "appropriate authority." 5 C.F.R. § 550.803.

The Federal Circuit ignored petitioner's backpay claim. It has thus placed itself in conflict with those courts that have granted backpay in similar situations.

See Brown v. Dep't of Justice, 715 F.2d 662 (D.C. Cir. 1983); Seebach v. United States, 182 Ct. Cl. 342 (1968); Kleinfelter v. United States, 162 Ct. Cl. 88, 318 F.2d 929 (1963). See also 39 Decis. Comp. Gen. 154 (1959). As a result of the Federal Courts Improvement Act, the Federal Circuit will now hear the vast majority of appeals from the Merit Board. See 5 U.S.C. § 7703(b)(1). Only cases presenting claims of unlawful discrimination in addition to Civil Service issues are channelled to the District Courts. See 5 U.S.C. § 7703(b)(2). Given the Federal Circuit's near-monopoly on review of the Merit Board, intervention by this Court is essential.

CONCLUSION

For the reasons stated, a Writ of Certiorari should issue to the United States Court of Appeals for the Federal

Circuit.

Respectfully submitted,

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APPENDIX

Opinion of the Court Below

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CHARLES A. THOMAS, Petitioner,	)	
v.	)	Appeal No. 84-1487
GENERAL SERVICES ADMINISTRATION, Respondent.	)	

DECIDED: March 4, 1985

Before RICH, DAVIS, AND NIES, Circuit Judges.

DAVIS, Circuit Judge.

Charles A. Thomas seeks review of a final decision of the Merit Systems Protection Board (MSPB or Board). ___ MSPB ____, 84 FMSR Par. 5391 (1984), Case No. PH075210608. The Board concluded that it had no jurisdiction to hear petitioner's appeal from a decision by the General Service Administration (GSA) placing

petitioner on enforced leave status. We disagree with the Board's conclusion regarding its jurisdiction, but hold that the record developed below, and the Board's own findings, require that the agency's action be sustained. We therefore reverse the decision of the Board on the matter of its jurisdiction and affirm as to its findings of the facts and remand with instructions to sustain the agency's suspension action.[1/]

I.

Background

Petitioner was a training specialist with the Federal Protective Service (FPS), the division of GSA responsible for law enforcement on government property. In this capacity, he was responsible for training other FPS

1/ This case solely concerns petitioner's attack on his suspension. We do not consider or pass upon petitioner's subsequent removal from his position.

officers, training and evaluating contract security guard services, and similar duties involving FPS personnel.

Problems within his office arose because petitioner repeatedly exhibited what has been said to be bizarre behavior. Specifically, the agency's charges allege, inter alia, that petitioner would level a realistic-looking toy pistol at fellow employees to practice his aim; that petitioner would practice martial arts on soda machines and other objects; and that petitioner on one occasion hacked at a cardboard carton with a scissors while saying "even this is too good for her" -- allegedly referring to a fellow employee. According to GSA, petitioner also discussed an incipient revolution (of which he would be a part) with such conviction and in such detail that his fellow employees became nervous in petitioner's presence.

In January 1982 GSA ordered petitioner to submit to a psychiatric fitness-for-duty

examination. After the examination, at which the psychiatrist found him to be highly paranoid, GSA placed him on involuntary sick leave. Soon thereafter, on May 22, 1982, the GSA proposed petitioner's suspension from the federal service, citing both his behavior around the office and its adverse impact on the other employees as the cause. In a notice to petitioner, GSA said that the proposed suspension would run until GSA decided whether to apply for disability retirement on petitioner's behalf; if the GSA decided so to apply, the notice continued, the suspension would remain in effect pending a decision on the application. On June 10, 1982, GSA sent petitioner final notice that it had decided to proceed with a disability retirement application. Two weeks later, GSA notified him of its decision to place him on indefinite suspension pending a decision on that application.

Petitioner appealed that GSA decision to the MSPB. In the initial decision, the

presiding official reversed the agency's action. He found that none of the particular charges of bizarre behavior supported the action, as each was either in itself explainable in the circumstances or otherwise not sufficiently disruptive as to affect the efficiency of the service. 5 U.S.C. § 7513(a) (1982). The presiding official also concluded that, even if one considered all of the allegations together, the evidence did not support the conclusion that petitioner had a disruptive impact on his office.

The full Board vacated the presiding official's opinion and ruled that it had no jurisdiction to hear the appeal. Relying on its decision in Mosely v. Department of the Navy, 4 MSPB 220 (1980) aff'd, 229 Ct. Cl. 718 (1981) (per curiam), the Board held that, in order to be an appealable action, the placement of an employee in non-pay status must: (1) be involuntary; (2) occur at a time when the employee is ready, willing and

able to work; and (3) stem from a "disciplinary-type situation." The Board canvassed the record and determined that, viewing petitioner's behavior in the aggregate, he "was a disruptive, threatening force in his workplace and his behavior was frightening to his coworkers." Because petitioner was not "able to work" as the Board defined it, the MSPB considered that GSA's action did not fit into the category of an "appealable suspension," and the Board dismissed the appeal to the MSPB for lack of jurisdiction.[2/]

II.

Board Jurisdiction

Under the Civil Service Reform Act of 1978 (the Act), a federal employee has the right to "submit an appeal to the [MSPB] from

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2/ The agency's application for disability retirement was denied by OPM and he was subsequently removed by his agency. His challenge to that removal is not at all included in the current appeal. See note 1, supra.

any action which is appealable to the Board under any law, rule or regulation." 5 U.S.C. Sec. 7701(a) (1982). The Act sets forth certain adverse actions from which employees may appeal, including, inter alia, removal, suspension for more than fourteen days, and reduction in pay. Id. at § 7513(a), (d) (detailing procedures to govern certain actions and providing for appeal to the MSPB therefrom). The Act also sets forth the nature of these adverse actions. It defines "suspension" as "the placing of an employee, for disciplinary reasons, in a temporary status without duties or pay." Id., §§ 7501(2), 7511(a)(2), 7512(2). We must determine whether GSA's decision to place petitioner on enforced leave constituted an appealable "suspension"; if it did, the Board had jurisdiction over the appeal.

The legislative history of the Act adds little to the statutory definition of "suspension." Congress stated only that it intended

to enact "the definition of the term previously adopted by the Civil Service Commission in its policy issuances." S. Rep. No. 969, 95th Cong. 2d Sess. 47 (1978), reprinted in 1978 U.S. Code Cong. & Ad. News 2723, 2769. The Board in Martin v. Department of the Treasury, 10 MSPB 568 (1982), discussed the prior administrative definition; the Civil Service Commission had defined a suspension as "an action placing an employee in a temporary non-duty and non-pay status for disciplinary reasons or for other reasons pending inquiry." Id. at 571 (emphasis in original), quoting the former Federal Personnel Manual Supp. 752-1, S1-6(a). The Board emphasized the disciplinary aspect of a suspension in Tyndall v. Department of the Navy, 5 MSPB 247, 247 (1981) ("A suspension, as described in 5 U.S.C. § 7501(2) [and incorporated into § 7511(2)], is the placing of an employee, for disciplinary reasons, in a temporary status without duty and pay."

(Emphasis in original)).

We hold that GSA's action in this case falls within the jurisdiction of the MSPB, whether that action be deemed taken for purely disciplinary motives (in the sense of punishment) or whether it was taken because it was necessary in order to place petitioner apart from his fellow workers during the period until the disability application could be acted upon by OPM. If the agency suspended petitioner simply because of his objective conduct -- without regard to the possible source of that conduct in some psychiatric condition -- the suspension plainly had a disciplinary base. The full Board in its opinion said that Thomas had engaged in "inappropriate, disruptive, and threatening behavior in the workplace"; it further concluded that he was a "disruptive, threatening force in the workplace and his behavior was frightening to his co-workers." The suspension was because of this conduct -- and, significantly, not

because of his own work record. This sort of suspension can fall within the normal meaning of "discipline," i.e., punishment intended as a sanction for improper conduct. See 30 Comp. Gen. 342, 343-44 (1951) ("The term 'suspension from the service' as used in [the corresponding statute prior to the Act] primarily is concerned with charges arising out of an employee's conduct").

On the other hand, if, as the Board thought and appears probable, the suspension occurred because of Thomas' psychiatric problems as disclosed by the psychiatrist's fitness-for-duty report, this appeal to the MSPB was still proper because the suspension was to await the OPM decision as to the disability application. An OPM regulation 5 C.F.R. § 831.1206 provides:

> An agency shall retain an employee in an active duty status until it receives the initial decision . . . on an agency application for disability retirement, except that the agency on the basis of medical evidence, may place an employee on

> leave with his/her consent, or without his/her consent when the circumstances are such that his/her retention in an active duty status may result in damage to Government property, or may be detrimental to the interests of the Government, or injurious to the employee, his/her fellow workers, or the general public. (Emphasis added.)

If, as may very well be the case, GSA suspended petitioner (until the decision on the application for disability retirement), this was because the quoted regulation authorized GSA to take that course if the circumstances were such that his retention in duty status might be detrimental to the Government's interests and injurious to Thomas' fellow employees.

The question then is (on this understanding of GSA's action) whether such a "non-disciplinary" suspension (in the narrow sense of "disciplinary") is appealable to the MSPB under the Reform Act. As we have pointed out supra, an employee can appeal "from any action which is appealable to the Board under any law, rule, or regulation". (Emphasis added.)

As for the "law" here, the prime problem is that the Civil Service Reform Act seems on its face to define an appealable suspension as having a "disciplinary" component. However, the legislative history indicates that Congress wished to continue the practice of the former Civil Service Commission, and that Commission had specifically defined a "suspension" as including the placing of an employee in a temporary non-duty and non-pay status "for disciplinary reasons or for other reasons pending inquiry" (emphasis added). The latter standard squarely covers the type of involuntary suspension envisaged for disability retirement cases by the emphasized portion of 5 C.F.R. § 831.1206 supra. We conclude that Congress did not intend, in the Reform Act, to preclude appeals of involuntary suspensions of that character. Such suspensions -- which are ordered because the agency believes that the employee's retention on active duty could result in damage to federal

property, or be detrimental to governmental interests, or be injurious to the employee, his fellow workers, or the public -- are "disciplinary" in the broader sense of maintaining the orderly working of the Government against possible disruption by the suspended employee (pending the determination of that employee's disability retirement).[3/]

In addition, the regulation embodied in 5 C.F.R. § 831.1206 can be interpreted -- in combination with the statutory right to appeal a suspension longer than 14 days -- as

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3/ One accepted meaning of the noun "discipline" reflects this concept of maintaining order. See Webster's Third New International Dictionary (1968): "behavior in accordance with the rules (as of an organization)"; "systematic, willing and purposeful attention to the performance of assigned tasks"; "orderly conduct." See also Ballentine's Law Dictionary (3rd ed. 1969): "The maintenance of good order in a voluntary association or club . . . ."

implicitly authorizing an appeal to the Board from an agency suspension (of this type) that the employee considers wholly unwarranted.[4/] It is hard to believe that this regulation intended to permit a prolonged suspension (i.e., of more than 14 days) to be left wholly to the agency's own judgement even though a comparable suspension of purely "disciplinary" character (in the strict sense) would clearly be appealable. The actual impact on the employee would be the same, and there would be no adequate reason for distinguishing

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4/ We have noted supra that the Reform Act authorizes appeals from decisions made appealable under a "rule or regulation."

between the two (on the question of appealability).[5/]

We hold, for these reasons, that the Board did have jurisdiction -- contrary to its holding -- over Thomas' appeal to it from his suspension.

III.

The Merits

Nevertheless, we need not remand to the Board to determine again whether the suspension was proper. In deciding (on an erroneous

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5/ Neither Mosely v. Department of the Navy, 229 Ct. Cl. 718 (1981) nor Johnson v. Orr, 747 F.2d 1353 (10th Cir. 1984), nor any of the prior decisions of this court, involved a suspension of the character of the current suspension or a suspension covered by 5 C.F.R. § 831.1206. In the present type of situation there is no need -- for an appealable suspension to be present -- of the requirement stated in those decisions that (a) the employee be ready, willing and able to work, and that (b) the suspension grow out of a "disciplinary-type situation" (in the strict sense).

legal ground) that it did not have jurisdiction, the Board thoroughly appraised the record and found facts which have a direct bearing on the propriety of GSA's action under the correct theory of jurisdiction. There is no need for a further determination. On the record, the Board would make no other fact findings if we remanded for direct consideration of the merits.

For one thing, the Board considered and accepted the psychiatric fitness-for-duty report of the examining psychiatrist (chosen by petitioner himself) who concluded that Thomas' paranoid personality disorder would tend to lead him to retaliate against fellow workers "in the event of real or fancied mistreatment." The Board also found that "[t]he record is replete with ample, corroborated evidence warranting the agency action in placing [petitioner] in enforced leave without pay [sic] status in order to remove him from the workplace," and that GSA had "presented

evidence of several incidents illustrative of [petitioner's] inappropriate, disruptive, and threatening behavior in the workplace." In that connection the MSPB summarized the testimony of and memoranda written by Thomas' co-workers -- all of which were found to be credible by the presiding official -- in which they described petitioner's actions and expressed anxiety regarding petitioner's ability to control his behavior.

The Board acted well within its competence in evaluating the impact of the credible evidence on the propriety of petitioner's remaining on active duty with FPS. We cannot disturb these findings and conclusions because they are supported by substantial evidence on the record as a whole. 5 U.S.C. § 7703(c) (1982).

We therefore reverse the holding of the Board that it lacked jurisdiction over petitioner's appeal. We affirm the Board's

fact-findings and remand with instructions to sustain the agency's suspension action.

REVERSED AND REMANDED WITH DIRECTIONS.

Order Denying Rehearing

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CHARLES A. THOMAS,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 84-1487
	)	
GENERAL SERVICES ADMINISTRATION,	)	
	)	
Respondent.	)	

O R D E R

A petition for rehearing and a suggestion for rehearing in banc having been filed in his case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the petition for rehearing be, and the same is hereby, Denied.

The suggestion for rehearing in banc is

declined.

FOR THE COURT

/s/ George E. Hutchinson

George E. Hutchinson,
Clerk

April 5, 1985

Date

cc: Elliot B. Platt
Sharon Y. Eubanks

Opinion and Order of
Merit Systems Protection Board

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CHARLES A. THOMAS	)	
	)	
v.	)	DOCKET NUMBERS
	)	PH07528210608
	)	PH07528310635
GENERAL SERVICES ADMINISTRATION	)	

OPINION AND ORDER

On May 14, 1982, the General Services Administration, Federal Protective Service (agency), placed appellant in enforced sick and annual leave status from his position as Training Specialist, pending the agency's decision whether to file an application for disability retirement on appellant's behalf. On May 27, 1982, the agency gave appellant notice that it proposed to indefinitely suspend him,[1/] no earlier than 30 days from his

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1/ The agency erroneously denoted its placing of appellant in an enforced leave without pay status as a suspension. For purposes of clarity, we will continue to refer to the action as a suspension in this Opinion and Order.

receipt of the notice, by placing him in an enforced leave without pay (LWOP) status upon the expiration of his enforced annual leave. Agency File, Tab 30. This suspension was to be effective until the agency decided to apply for disability retirement on appellant's behalf, and, if it did so, until a decision was issued on the application by the Office of Personnel Management (OPM).[2/] Based on the results of a psychiatric fitness-for-duty examination and appellant's alleged acts of misconduct, the agency initiated an application

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2/ On January 29, 1982, the agency had convened a disciplinary panel in order to determine whether certain alleged acts of misconduct by appellant warranted disciplinary action. The members of the panel instead concluded that there was reason to believe that appellant's misconduct was a result of emotional or mental illness and recommended that appellant undergo a psychiatric fitness-for-duty-examination. Agency File, Tabs 10-16.

for disability retirement for appellant on June 10, 1982. Agency File, Tab 35.

The specific reasons for the agency's action placing appellant in enforced leave without pay status were:

> Your behavior has had an adverse impact on productivity and morale. Those employees affected the most by your actions are your co-workers. Their fears are based on your bizarre behavior, specifically, your constant display of a preoccupation with the martial arts, including your display of martial acts on vending machines in the building. You have also been observed on numerous occasions pointing a realistic replica of a .45 caliber revolver at various members of the staff and directing comments such as, "this is even too good for her," while slashing a cardboard box with a pair of scissors. Your constant staring, argumentative nature, preoccupation with the martial arts, revolutionary statements and practicing sight alignment with your replica revolver perpetuates fears in your fellow workers and has affected the efficiency and morale of your co-workers.
> Agency File, Tab 30.

Appellant filed a petition for appeal from the agency's action with the Board's Philadelphia Regional Office, and a hearing was held. In an initial decision issued on April 15, 1983, the presiding official found

that the agency did not have reasonable cause to believe that appellant's continued presence in the workplace constituted a hazard to his co-workers or adversely affected their efficiency, and, as a result, the agency had failed to prove by a preponderance of the evidence that appellant's suspension was for the efficiency of the service. She therefore reversed the agency's action. Both parties have filed timely petitions for review, and appellant also has filed a response to the agency's petition.

In his petition for review, appellant contends, inter alia, that the presiding official erred in failing to find that the agency had suspended appellant in retaliation for his activities as a whistleblower. In its petition, the agency argues, inter alia, that the Board lacks subject-matter jurisdiction because its suspension action was not disciplinary in nature but was instead an indefinite suspension pending OPM's decision

on appellant's disability retirement.3/

During the pendency of the suspension action, on March 18, 1983, OPM denied the agency-filed retirement application. The agency requested OPM to reconsider its denial; then, on April 12, 1983, prior to the issuance of the Board's initial decision on the suspension action, the agency proposed to remove appellant based on charges that appellant's acts and statements conveyed threats of bodily injury to his co-workers. OPM denied the agency's request for reconsideration on June 30, 1983. The agency's removal action was taken on July 13, 1983.

Appellant filed a petition for appeal from his removal to the Board's Philadelphia Regional Office, arguing that the charges and evidence in the removal action were identical

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3/ Because of our disposition of this appeal, we need not and will not address the remaining arguments of the parties.

to those previously brought in the suspension action. Appellant argued that the doctrine of collateral estoppel specifically precluded the agency from bringing and relitigating the same charges in the removal action. The agency did not dispute that the charges and the evidence in support of its action were the same in both actions but asserted that because it had filed a petition for review of the initial decision of April 15, 1983, reversing the suspension action, that initial decision was not a final judgment, which precludes the application of collateral estoppel.

In an order issued October 25, 1983, the presiding official granted appellant's motion prohibiting the agency from introducing any evidence concerning the charges brought against appellant. The presiding official concluded that despite the fact that the prior initial decision was not final, as both appellant and the agency had filed petitions for review, the doctrine of collateral

estoppel barred the agency from relitigating the charges. Citing the interests of justice and judicial economy, the presiding official then issued a second order on October 25, 1983, certifying an interlocutory appeal on her own motion to the Board. This interlocutory appeal presents three questions:

(1) Does collateral estoppel apply between initial decisions of different presiding officials?

(2) Is this case an appropriate one for the application of collateral estoppel?

(3) What effect does the filing of a petition for review have upon the use of a decision for collateral estoppel purposes?

We hereby GRANT the appellant's and the agency's petitions for review of the initial decision in Charles Thomas v. General Services Administration, MSPB Docket No. PH0752821068 (April 15, 1983), pursuant to 5 U.S.C. § 7701 (c)(1). In addition, we hereby join our review of these petitions with our review of the Order and Interlocutory Appeal in the case

of Charles Thomas v. General Services Administration, MSPB Docket No. PH07528310635 (October 25, 1983), pursuant to 5 C.F.R. § 1201.36(a)(2).

Suspension Action

The presiding official characterized the agency's action of placing appellant in an enforced leave status pending OPM's decision on the agency-filed disability retirement application as a suspension as defined at 5 U.S.C. § 7501(2). We disagree. The agency's action was authorized by 5 C.F.R. § 831.1206, which provides that:

> An agency shall retain an employee in an active duty status until it receives the initial decision of the Associate Director for Compensation on an agency application for disability retirement, except that the agency on the basis of medical evidence, may place an employee on leave with his/her consent, or without his/her consent when the circumstances are such that his/her retention in an active duty status may result in damage to Government property, or may be detrimental to the interests of the Government, or injurious to the employee, his/her fellow workers, or the general public. If the leave account of the employee is or becomes exhausted, any suspension

> or involuntary leave without pay shall be effected in accordance with applicable laws, Executive orders, and regulations.

At the time the agency placed appellant in an enforced leave status pending a decision on his disability retirement, it had before it a medical report by Dr. Zigmond Lebensohn, who evaluated appellant for a psychiatric fitness-for-duty examination. Dr. Lebensohn diagnosed appellant as suffering from a paranoid personality disorder. He stated that appellant was "hypervigilant" and would take "precautions against any perceived threat" and that he was "defensive and would tend to retaliate in the event of real or fancied mistreatment." See Agency File, Tab 27. In addition, the agency had several reports from appellant's co-workers of his unusual and allegedly threatening acts and statements. See Agency File, Tab 25. Thus, the agency action placing appellant in an involuntary leave status was properly taken under the

exception at 5 C.F.R. § 831.1206 in reliance on the psychiatric fitness-for-duty evaluation.

In Mosely v. Department of the Navy, 4 MSPB 220 (1980), the Board set out three questions that must be answered affirmatively for enforced leave to constitute an appealable suspension:

(1) Was the appellant placed on leave involuntarily?

(2) Was the appellant, in fact, ready, willing, and able to work during the period in question?

(3) Was the enforced leave used in a personal, disciplinary-type situation?

Appellant bears the burden of establishing every element of the Board's jurisdiction over his alleged suspension. 5 C.F.R. § 1201.56(a)(2). The first question, whether appellant was placed on leave without his consent, must be answered affirmatively. The second question, whether appellant was ready, willing, and able to work, requires evaluation of the

medical evidence and other documentation of appellant's unusual and threatening behavior.

As employed in Mosely, supra, the term "able" must be interpreted to mean what the word is generally understood to mean, that an individual is fit or competent to perform all of the duties of his position. Johnson v. Department of the Air Force, MSPB Docket No. DA07528090040 (November 5, 1982). Not only must an employee be willing and able to perform his assigned duties, but also his conduct or his physical or mental condition must not create a situation incompatible with the orderly operation of the workplace. Under the circumstances of this case, we find that, although appellant may have been ready and willing, his ability to perform was, in fact, hindered by his mental condition.

In his psychiatric fitness-for-duty report, Dr. Zigmond Lebensohn diagnosed appellant as suffering from a paranoid personality disorder. Dr. Lebensohn stated that

appellant had "a pervasive attitute of suspiciousness and a tendency to accuse all those who did not agree with him ... of attempting to block his efforts to expose corruption and to indulge in 'retaliatory action.'" Agency File, Tab 27 at 9-10. He also concluded that appellant suffered from "gross defects" in insight and judgment, was "hypervigilant," "takes precautions against any perceived threat," and "tends to avoid blame even when it is warranted and tends, rather, to blame others." Appellant also "would tend to generate uneasiness or fear in his contacts with those he views as potential adversaries." Furthermore, Dr. Lebensohn stated that "although he [appellant] talks about retaliation on the part of GSA, it is really he who is defensive and would tend to retaliate in the event of real or fancied mistreatment." Id. at 11.

The agency also presented evidence of several incidents illustrative of appellant's

inappropriate, disruptive, and threatening behavior in the workplace. For example, Sara McColgan, Chief, Programs and Support Services Branch, prepared a memorandum detailing a counseling session she arranged with appellant to discuss how appellant needed to achieve a mode of behavior acceptable and appropriate to a professional workplace. She stated that, at this meeting, appellant told her that a revolution, of which he would be a leader, would soon begin, and that victims of bloodshed would include her and four other supervisors (John Thompson, John McDonald, John Ramos, and Jo Hogan), apparently because they were "guilty of crimes against the people." Agency File, Tab 25. At the hearing, Ms. McColgan testified that she became afraid that appellant would "lose control and carry out some acts he would later be sorry for." Hearing Transcript (H.T.) at 92. Ms. McColgan also reported in the memorandum that appellant stated that it was his duty to right the

wrongs of the ruling class and that he was like a hangman who could eat a large breakfast after a hanging.

Nancy Zawadsky, a secretary, described her witnessing of appellant stabbing and slashing a box with scissors while saying "even this is too good for her." Agency File, Tab 25. Ms. Zawadsky testified that she believed appellant was referring to Jo Hogan, an administrative officer. She also testified that appellant telephoned her and told her that he could come into the office and kill everyone and be back at work within a year because he would plead insanity. H.T. at 159-161; Agency File, Tab 32.

John Ramos, a supervisor, prepared a memorandum detailing his observations of appellant's unusual behavior. He stated that he had seen appellant at various times executing martial arts movements in the office involving punching, twisting, and turning. Mr. Ramos also reported that appellant period-

ically aimed a realistic replica of a pistol that he kept in his desk at co-workers' heads. Agency File, Tab 25.

The appellant testified at the hearing that he believes that one of his obligations is "to protect that weak from their oppressors" and that, in a just society, his supervisors and co-workers would be brought to justice and punished. H.T. at 744-47. Appellant denied that he told Ms. McColgan anything about victims of bloodshed during a revolution, that he slashed the box and threatened a female employee, or that he telephoned Ms. Zawadsky and made death threats. H.T. at 743-45, 756-58. Appellant acknowledged that he performed martial arts movements in the workplace, H.T. at 721, and that he kept a replica of a gun in his desk with which he practiced grip and sight alignments, H.T. at 733.

We conclude that the cumulative effect of the evidence, especially the psychiatric fitness-for-duty report, establishes that

appellant was not ready, willing, and able to perform the duties of his position because of his mental condition during the period in question. The record is replete with ample, corroborated evidence warranting the agency action placing appellant in enforced leave without pay status in order to remove him from the workplace. Appellant was a disruptive, threatening force in the workplace and his behavior was frightening to his co-workers. Accordingly, we find that appellant was unable to perform his duties in the structure of the workplace without constituting a threat to the well-being of his co-workers. The presiding official's contrary findings were erroneous and are reversed. Consequently, the agency's action was not an appealable suspension within the Board's jurisdiction. See Mosely, supra.

Accordingly, the initial decision in Thomas v. General Services Administration, MSPB Docket No. PH07528210608 (April 15, 1983) is VACATED and the appeal is DISMISSED for

lack of jurisdiction.

This is a final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(b).

Order and Interlocutory Appeal

Because of our disposition of the first action between the parties, the order of the presiding official prohibiting the agency from presenting evidence in the removal action, based on her application of the doctrine of collateral estoppel, is erroneous. We hereby VACATE the order of the presiding official, and REMAND the removal action for full adjudication of all charges and appellant's affirmative defenses. Furthermore, the questions presented by the interlocutory appeal as to the application of collateral estoppel between initial decisions have become moot. Accordingly, we hereby VACATE the interlocutory appeal.

Appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action dismissing Thomas v.

General Services Administration, MSPB Docket No. PH07528210608 (April 15, 1983), by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

May 17, 1984
(Date)

/s/ Robert E. Taylor
Robert E. Taylor
Secretary

Washington, D.C.

Initial Decision of Merit Systems Protection Board

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
PHILADELPHIA REGIONAL OFFICE

CHARLES A. THOMAS

v.

GENERAL SERVICES ADMINISTRATION

Initial Decision Number: PH07528210608
Date: 15 APR 1983

INTRODUCTION

This is an appeal from an indefinite suspension. On June 28, 1982, Charles A. Thomas filed an appeal from the action taken by the General Services Administration (GSA) suspending him for an indefinite period from his position as a Training Specialist for the Federal Protective Service in Philadelphia, Pennsylvania. Tab 1. The indefinite suspension became effective on June 29, 1982. Tab 4.

At the appellant's request, a hearing of this

matter was held. The hearing took place on December 8, 9 and 10, 1982, in Philadelphia, Pennsylvania. The parties were allowed to present evidence, argument, testimony of witnesses and summation. The record of the case remained open at the conclusion of the hearing in order to allow the parties an opportunity to submit memoranda of law. Both parties submitted memoranda of law.

JURISDICTION

Merit Systems Protection Board (Board) regulations require appeal petitions to be filed "anytime during the period beginning with the day after the effective date of the action being appealed..." 5 C.F.R. Section 1201.22. Here, the effective date of the action appealed was June 29, 1982. The first day for filing an appeal was June 30, 1982, yet the appellant filed his appeal on June 28. Even though two days premature, I have decided that for the sake of administrative efficiency, to accept the appeal as timely filed.

I find that since the appellant was indefinitely suspended pursuant to 5 C.F.R. Section 831.1206 and 5 U.S.C. Section 75, that the agency's action must comply with applicable laws, Executive orders and regulations. Those applicable laws, Executive orders and regulations include the provisions of: 5 U.S.C. Section 7501 (which provides definitions of the terms employee and suspension); 1/ 5 U.S.C. Section 7511 (which also defines the term

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1/ Under 5 U.S.C. Section 7501(2), a suspension is defined as a means of placing an employee for disciplinary reasons, in a temporary status without duties and pay. The appellant here was suspended pending a determination by OPM on an agency-initiated disability retirement application. Appeal File, Tab 4, Agency File Tab 37.

The Board recognizes that suspensions for other than disciplinary reasons were meant to be included in the statutory meaning of "suspension," so suspensions of more than 14 days for disciplinary reasons or for other reasons pending inquiry, are appealable to the Board. Martin v. Department of the Treasury, MSPB Docket No. AT075209044 at 6 (June 1, 1982).

employee); and 5 U.S.C. Section 7513 (which describes cause and procedure).

Since the Board has appellate jurisdiction over suspensions of employees for more than 14 days, I find that the Board has appellate jurisdiction over this case. 5 U.S.C. Section 1205 and 5 C.F.R. Section 1201.3.

ANALYSIS AND FINDINGS

On May 27, 1982, the agency issued its advance notice of proposed indefinite suspension which informed the appellant of the reasons the suspension was being proposed. Agency File, Tab 30. Those reasons were stated as follows:

> The tentative notice was dated May 14, 1982, and was based on medical findings developed by Dr. Zigmund Lebensohn as a result of a Fitness-For-Duty examination and the evidence of record. Upon receipt of that tentative notice, you were placed on enforced sick leave, at the expiration of which you would be placed on enforced annual

leave. You were advised you would remain in this enforced leave status until a decision on the tentative notice was made.

Your behavior has had an adverse impact on productivity and morale. Those employees affected the most by your actions are your co-workers. Their fears are based on your bizarre behavior, specifically, your constant display of a preoccupation with the martial arts, including your display of martial acts on vending machines in the building. You have also been observed on numerous occasions pointing a realistic replica of a .45 caliber revolver at various members of the staff and directing comments such as, "this is even too good for her," while slashing a cardboard box with a pair of scissors. Your constant staring, argumentative nature, preoccupa-

> tion with the martial arts, revolutionary statements and practicing sight alignment with your replica revolver perpetrates fears in your fellow workers and has affected the efficiency and morale of your co-workers.

Appeal File, Tab 4, Agency File, Tab 30. The appellant was given 15 days from the date he received the notice, to respond personally or in writing. On June 9, 1982, the appellant responded in writing. Appeal File, Tab 4, Agency File, Tab 33. Nevertheless, on June 24, 1982, the agency decided to indefinitely suspend the appellant effective June 29, 1982.

In order to have its action sustained, the agency bears the burden of proving its case by a preponderance of the evidence. 5 U.S.C. Section 7701(c)(1)(B). A preponderance of the evidence is that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as

sufficient to support a conclusion that the matter asserted is more likely to be true than not true. 5 C.F.R. § 1201.56(c)(2).

In addition to proving its case by a preponderance of the evidence, the agency must also prove that its action was taken for the efficiency of the service. 5 U.S.C. § 7513(a); Phillips v. Bergland, 586 F.2d 1007, 1010-11 (4th Cir. 1978); Young v. Hampton, 568 F. 2d 1253, 1257 (7th Cir. 1977); Martin v. Department of the Treasury, MSPB Docket No. AT075209044 at 10 (June 1, 1982) (employee indefinitely suspended because agency believed he had committed imprisonable offense).

Once established that the action was taken for the efficiency of the service, the agency must then show that the penalty chosen was reasonable in light of the circumstances. Douglas v. Veterans Administration, 5 MSPB 313, (April 10, 1981). 2/

2/ The reasonableness of the penalty need not be proven by a preponderance of the evidence.

On June 10, 1982, the agency issued a decision to file a disability application with OPM on the appellant's behalf. Agency File, Tab 34. The notice of decision stated the agency's opinion that the appellant could not effectively function in his position or any other position in the agency due to mental or emotional illness or disease. That same notice informed the appellant that he would be carried on enforced leave, and when his leave expired, the agency intended to suspend him. Agency File, Tab 34.

When the appellant's leave balance expired, he was suspended for an indefinite period pending OPM's decision on the agency-filed disability application. It is from the suspension that this appeal stems.

The Board has determined that "the most essential criterion of an action, if it is to meet the definition of 'suspension' set forth at 5 U.S.C. Section 7501(2), is that it be temporary." Martin at 6. The Board went on

to say: "(W)hile the exact duration of an indefinite suspension may not be ascertainable, such an action must have a condition subsequent such as the completion of a trial or investigation which will terminate the suspension." Martin at 6-7. In the instant case, the indefinite suspension was imposed with a condition subsequent (OPM's decision). Agency File, Tab 37. Therefore, it meets the temporariness criteria of a suspension.

I will now examine each of the reasons the agency set forth for the indefinite suspension. First, the proposing official, John C. Thompson, testified that he proposed the suspension: "Because of all the documents that were before me, the atmosphere in the office, the safety of the employees, and the efficiency of the service..." H.T. 341. One of the documents before him was a report from Dr. Zigmond Lebensohn.

The agency required the appellant to undergo a fitness-for-duty examination. Agency File,

Tab 16. The decision to order the appellant examined was the result of a disciplinary panel which convened to determine whether certain alleged acts of misconduct warranted disciplinary action. However, instead of proposing disciplinary action, the panel determined that there was reason to believe that the appellant's alleged misconduct was a result of emotional or mental illness. Agency File, Tabs 10-16. The appellant underwent a fitness-for-duty examination by Dr. Zigmond M. Lebensohn. Dr. Lebensohn's psychiatric evaluation of the appellant was filed on May 3, 1982. Agency File, Tab 27. Dr. Lebensohn diagnosed "paranoid personality disorder," but made no conclusion regarding the appellant's fitness for duty. Agency File, Tab 27. Mr. Thompson testified that he read and relied upon Dr. Lebensohn's report before he decided to propose the indefinite suspension. H.T. 348. Mr. Thompson also testified that he noticed no internal inconsistencies in the

report, nor any inconsistencies between the report and his personal observations of the appellant. H.T. 348-355.

The other documents that Mr. Thompson stated that he examined were memoranda from Sara McColgan dated April 7, 1982; a memorandum from John Ramos dated April 7, 1982, and a memorandum from Nancy Zawadsky dated May 21, 1982. Agency File, Tab 25. There were also two documents in the group (reviewed prior to Thompson's proposal) from the appellant. Those two documents were a copy of an editorial the appellant had written for the Federal Times newspaper, and a copy of a diagram drawn by the appellant titled: O.B.: Operation CANNAE. Agency File, Tab 25.

When questioned about his consideration of the documents, Mr. Thompson stated that he had discussed the contents of Ms. McColgan's memoranda before she submitted it, but that he had not told her what to write. H.T. 337. He also stated that Ms. McColgan had been very

anxious, upset and emotionally wrung out by the comments. H.T. 340.

Mr. Thompson then testified that Mr. Ramos had not discussed the contents of his memorandum before submitting it. H.T. 338. Mr. Thompson did discuss the contents of Ms. Zawadsky's memorandum with her before she submitted it. H.T. 340 and 356. Mr. Thompson said that during his discussion of the contents of Ms. Zawadsky's memorandum, she appeared to be pale and very frightened. H.T. 340.

On cross-examination, Mr. Thompson recalled that in February 1982 he had requested the branch chiefs to document any unusual behavior by the appellant. H.T. 362.

The memoranda submitted by the three above named employees reported several different instances of allegedly unusual behavior.

Ms. McColgan prepared 2 memoranda dated April 7. One was a letter of counseling in which she admonished the appellant for referring to John Thompson as a clown and a

criminal. The other memorandum documented the appellant's behavior when she presented him with the letter of counseling. Agency File, Tab 25. Ms. McColgan wrote that the appellant's behavior caused her to be concerned for her safety, and the safety of other management officials and the appellant's co-workers. Agency File, Tab 25. When she appeared at the hearing, Ms. McColgan testified that when she heard the comments the appellant made when she gave him his letter of counseling, she became afraid that he would "lose control and carry out some acts he would later be sorry for." H.T. 92. On cross-examination, Ms. McColgan testified that the conversation which included the derogatory remarks about Mr. Thompson, had begun as advice against the appellant's taking on the role of an EEO counselor, but the conversation strayed to other things. H.T. 117-119. Ms. McColgan testified that the conversation did not escalate into an argument.

H.T. 118. However, appellant later testified that he and Ms. McColgan had on that day argued over Ms. McColgan's performance regarding EEO, and that she had become defensive and hostile. H.T. 737, 742, 752.

The second conversation which Ms. McColgan documented, if true, is more damaging to the appellant's case. Ms. McColgan wrote that the appellant told her he was a revolutionary leader, H.T. 125, that he was forming the group, H.T. 125, though the group did not really exist. H.T. 126. Ms. McColgan also testified that the appellant said he was going to kill people. H.T. 126. Then Ms. McColgan said that the appellant told her people would be killed through the revolution though he did not say he was personally going to murder. H. T. 126. When asked whether the appellant told her he was going to harm anyone, Ms. McColgan replied, "He did not say he would personally carry out that." H.T. 126. Ms. McColgan also admitted that even after the conversations that allegedly distressed her,

she continued to have light moments of joking and talking with the appellant in the office. H.T. 128. In Broadnax v. U.S. Postal Service, MSPB Docket No. SF0752990050 (February 9, 1982) the Board discussed what constitutes a threat. In Broadnax, the Board cited Watts v. United States, 394 U.S. 705, 708 (1969), for the proposition that "in order to determine whether utterances constitute a threat, consideration must be given to the context in which they occurred, the conditional nature of the statement, and the reaction of the listener." Broadnax at 17. In our case, Ms. McColgan testified that the appellant said he was a leader of a revolution and that people would be killed, but the appellant never said that he personally would carry out the acts, nor did he specify when the revolution was going to occur. H.T. 149. Ms. McColgan said that she concluded that the threat might be real because the appellant spoke about the revolution as if it was

already planned. H.T. 150

The appellant testified that he may have spoken to Ms. McColgan about revolution, but never told her that it would begin soon. H.T. 743. The appellant's version of the incident is that he told Ms. McColgan "if this were a just society she should have been punished or admonished in some way." H.T. 744. The other allegedly threatening statements Ms. McColgan recounted in her memorandum were that the appellant spoke "obsessively and at length about Hitler and gas chambers," specifically with regard to Josephine Hogan. Agency File, Tab 25. The appellant allegedly told Ms. McColgan that it was his duty to right the wrongs of the ruling class. He likened himself to a hangman who was able to eat large breakfasts afterwards and also stated management needed to be punished for crimes against the people. Agency File, Tab 25.

The appellant denied mentioning Hitler or gas

chambers. H.T. 747. He testified that Ms. McColgan s version of what he said was a little garbled, and that he told her that one of his obligations was to protect the weak from their oppressors. H.T. 747. The appellant admitted to talking about hangmen but in the context of pointing out "that some people do things to other people that are so bad that they don't generate much sympathy." H.T. 749. The appellant also stated that Ms. McColgan was vigorously defending Ms. Hogan when he made the hangman analogy. H.T. 749. Finally, Ms. McColgan testified that on one occasion the appellant confided that he once had an overwhelming urge to rape an unidentified woman in an elevator. H.T. 84. Ms. McColgan said that the appellant made the comment while he was talking about articles he had read on rape. H.T. 84. Ms. McColgan testified that the appellant was "talking about how he understood how rape is an act of pure agression and not really a sexual

attack on a woman per se." H.T. 84. Ms. McColgan testified that when she heard the statement she became apprehensive, but that her apprehension extinguished "to some degree" as time passed. H.T. 86-87. I find that the appellant's remarks about rape did not constitute a threat.

After examining the demeanor of both Ms. McColgan and the appellant, and comparing their versions to the statements made by the appellant which allegedly caused Ms. McColgan to fear for her life, I find that the statements made by the appellant did not constitute a threat. See Weaver v. Department of the Navy, 2 MSPB 297 (1980). The appellant's statements to Ms. McColgan about the revolution contained no indication that the appellant intended to carry out any acts. Furthermore, it appears that Ms. McColgan failed to take into account the context or the circumstances around which the statements were made when she wrote her memorandum. She and the

appellant vigorously disagreed over management's actions regarding EEO and other personnel matters. The fact that the appellant's views may have distressed Ms. McColgan, does not mean that what he said constituted a threat. Watts at 708. I find that the agency has failed to prove that Ms. McColgan had reason to fear the appellant.

Now I will examine the memorandum submitted by John Ramos on April 7, 1982. Agency File, Tab 25. Mr. Ramos reported to Mr. Thompson that he had observed the appellant for over a year and had observed "a number of strange and unusual things." Tab 25. Specifically, Mr. Ramos' memorandum stated that the appellant has a toy pistol which he keeps at his desk and periodically plays with it, holding, fondling and pointing it in the direction of others. Another example cited by Mr. Ramos was the appellant's executing martial arts routines in the office or hall when he thinks he is alone. Finally, Mr. Ramos opined that

the appellant was preoccupied with violence, terrorism, and war. Mr. Ramos' memorandum said" "His conversations all seem to be centered around, or contain comments on these topics." Mr. Ramos did not testify at the appellant's hearing, so I must determine how much weight to give his memorandum which is uncorroborated hearsay. Borninkhof v. Department of Justice, 5 MSPB 150 (1981) Mr. Thompson testified, regarding Mr. Ramos' memorandum. Mr. Thompson said that he was not sure he discussed Mr. Ramos' memorandum with Mr. Ramos after he received it. H.T. 362. Mr. Thompson also testified that he assumed that the "strange and unusual things" Mr. Ramos referred to were the same type of things (Mr. Thompson) had observed." H.T. 363. However, Mr. Thompson's further testimony showed that he was not exactly sure what things Mr. Ramos was referring to. H.T. 363-372. . Mr. Thompson testified that he did not know what Mr. Ramos meant when he alleged

that the appellant fondled the mock pistol. H.T. 363. Similarly, Mr. Thompson was not exactly sure what Mr. Ramos meant when Mr. Ramos reported that the appellant had a preoccupation with violence, terrorism, and war. H.T. 364. Mr. Thompson admitted that in his experience with the appellant, that all of the appellant's conversations had not centered on those topics, contrary to what Mr. Ramos alleged. H.T. 371.

Next, Ms. McColgan testified that she had noticed the mock pistol, but could not recall whether the mock pistol had made her nervous. H.T. 135-136. She also testified in essence that in the office where she and the appellant worked, other people had real guns on, and after examination she knew that appellant's gun was not real. H.T. 136.

Mr. Federico Cabanes, a firearms instructor, testified that he would not keep a replica like the appellant's on his desk. H.T. 555. Mr. Cabanes also testified that the replica

was realistic. H.T. 555. The appellant testified that he may have told Ms. McColgan that he kept the replica to make people nervous, as a joke. H.T. 736. However, the appellant testified that he kept the replica in his desk, but occasionally took it out to practice grip, and sight alignment. H.T. 753. When questioned why a person who, as a part of his duties, is not required to handle a firearm would need to practice those skills, the appellant testified that he had to understand the skills in order to "keep abreast of the latest in police science and tactical situations...and to pass it on through me to my field training officers, my firearms instructors, and thence to the men in the field." H.T. 735. The Board has found that an agency need not prove that a pistol is real in order to establish an apparent threat of physical harm and an attendant apprehension. Sierra v. Department of the Army, 5 MSPB 514, 515 (1981) (employee

claimed incident in which pointed fake gun at others was a joke). However, when there is no evidence of attendant apprehension, there is no threat. Id. at 515.

I find that the agency has failed to prove that anyone was threatened by the appellant's use of a mock pistol at work. Finally, with regard to Mr. Ramos' comments on the appellant's practicing martial arts routines when he thought he was alone, the appellant admitted that he occasionally practiced a form in order to kill dead time such as when waiting for an elevator or when he is "on hold" on the telephone. H.T. 723.

Mr. Cabanes testified that he too, on occasion, practices kicks and punches in order to relax at work. H.T. 549-50. Mr. Cabanes said that he does not practice in public, but instead does his exercises in the men's room. H.T. 550. No evidence was presented to show that anyone felt apprehensive about the appellant's practicing martial

arts forms at work.

No evidence was proffered that the appellant is preoccupied with terrorism and war. In fact, Mr. Thompson testified that he did not know what Mr. Ramos was referring to and his own experience with the appellant did not reflect a preoccupation with those topics. Ms. Zawadsky's memorandum will now be examined. Ms. Zawadsky wrote a memorandum dated May 21, 1982 in which she reported that in May 1982 she had observed the appellant stabbing a box with a pair of scissors saying "even this is too good for her." She also wrote "he was referring to a fellow female employee." When Ms. Zawadsky testified at the appellant's hearing she admitted that she did not know who the appellant was referring to when he made the alleged statement, and she was not positive that he was referring to a human being, but she had concluded that the appellant was referring to Ms. Josephine Hogan as he allegedly stabbed the

box. H.T. 167. The appellant denied ever slashing a box with scissors, though he occasionally cuts tape to open boxes. H.T. 755-756. The appellant admitted repeating a comment he allegedly heard from another employee regarding that employee's desire for the "Hatchet Woman to fall on her own knife." H.T. 756. The appellant opines that Ms. Zawadsky may have heard him repeat the comment. H.T. 757. After examining the conflicting testimony, I find that even if the appellant slashed a box and said "even this is too good for her," that does not reflect an intention to commit any act of violence. See Williams v. Veterans Administration and Merit Systems Protection Board, No. 82-1372, slip op. at 4 (8th Cir. March 16, 1983). It therefore falls short of a threat, and does not constitute behavior which would form the basis for a reasonable belief that the appellant intended to harm any one.

Later, Ms. Zawadsky reported another incident

to Mr. Thompson. Mr. Thompson wrote a memorandum dated June 8, 1982 documenting what Ms. Zawadsky reported. Agency File, Tab 32. Mr. Thompson's memorandum states that the appellant telephoned Ms. Zawadsky and told her that he could come into the office and kill everyone and be back at work within a year because he would plead insanity. Agency File, Tab 32. At the hearing Ms. Zawadsky testified that the caller had never identified himself, but she recognized the voice as that of the appellant. H.T. 160. The appellant denies making both the call and the statement. H.T. 758. I find that even if he did make the statement, that it was not indicative of an intent to commit an act, so it should not have been considered a threat. Williams at 4. Therefore, I find that the two incidents reported by Ms. Zawadsky did not form the basis for a reasonable belief that the appellant intended to harm any one. Similarly, the diagram the appellant drew titled

"Operation Cannae" does not evidence an intent to commit a violent act. It does not form the basis for a reasonable belief that the appellant was planning an actual battle. The appellant testified that the diagram was a plan of how the appellant could "stop the worst abuses in GSA and Federal Civil Service under the Reagan Administration." H.T. 776. He further testified that he wanted to "stop them" by using litigation hearings, civil trials and legislation. H.T. 776. Again, I find that the agency did not have reasonable cause to believe that the appellant intended to commit an act of violence. Williams at 4. Even though none of the above discussed documents, standing alone, provide grounds for a reasonable belief that the appellant's presence in the workplace jeopardized the safety of his co-workers, I must consider the cumulative effect of the evidence. Altemose Construction Company v. NLRB, 514 F.2d 8, 16 (3d Cir. 1975). The agency asserts that the

appellant causes fear in his co-workers, yet one of the co-workers who allegedly fears for her life testified that she had maintained a good relationship with the appellant even after he committed the acts which caused her to fear him. Specifically, Ms. McColgan testified that she continued to talk and joke with the appellant even after she reported that the appellant was a potential threat to other government employees. H.T. 127-128. However, Ms. Josephine Hogan testified that she was frightened by the appellant's hostility toward her. H.T. 219. She testified that "she really became concerned for her own safety" after Ms. Zawadsky told her about the alleged box slashing incident. H.T. 219. Ms. Hogan stated that she may have discussed the matter with Ms. McColgan, but believes that Ms. Zawadsky discussed it with Ms. McColgan. H. T. 220. Ms. Hogan testified that she found it difficult to work with the appellant in the office constantly staring and always

making remarks. H.T. 221. Ms. Hogan said she "was getting to the point where I was almost thinking about just asking for a leave of absence, I was afraid." H.T. 221. Yet, Ms. Hogan also said "Maybe I was just too sensitive to it." H.T. 221.

The evidence shows that Ms. Hogan and the appellant had, at one time, had a friendly relationship. The appellant bought Ms. Hogan a toy dog which she named "Little Charlie" after the appellant, and they occasionally lunched together. H.T. 224-227. At work, they engaged in the office horseplay. H.T. 227. They also argued about their different political views. H.T. 214. Ms. Hogan testified that they discussed her role regarding adverse personnel actions and RIF's in the office, and that the appellant held her responsible and called her "hatchet woman". H.T. 217-218,267. Ms. Hogan testified that after the discussion with Ms. Zawadsky, she was under added stress and

found it difficult to function. H.T. 282. Ms. Hogan testified that she was able to carry out her daily duties. H.T. 282.

I find that the evidence presented did not prove that Ms. Hogan's complaints of fear for her safety were reasonable. What was proven instead was that information Ms. Hogan received from Ms. Zawadsky caused Ms. Hogan to believe that the appellant had made threatening remarks. Yet, when the information from Ms. Zawadsky is closely examined, it shows that she gave Ms. Hogan an inaccurate account of the facts impregnated with her own misleading conclusions. The appellant should not be penalized because office gossip got out of hand.

In summary, based upon the testimony and the documentary evidence of record, I find that the agency did not have reasonable cause to believe that the appellant's continued presence in the work place presented a hazard to employee safety, or adversely impacted

the efficiency of those employees. Therefore, the agency has failed to prove by a preponderance of the evidence that the appellant's indefinite suspension was for the efficiency of the service. See Martin at 7.

I will now examine the appellant's allegations of reprisal for whistleblowing. The appellant's claim of reprisal constitutes an allegation of prohibited personnel practice. See 5 U.S.C. Section 2302(b)(9); Valerino v. Department of Human Services, 7 MSPB 347 (1981). Under 5 U.S.C. Section 7701(c)(2) and 5 C.F.R. Section 1201.56(b)(2), the Board is required to overturn the action of an agency even where the agency has met the evidentiary standard, in any case where the appellant demonstrates that the decision was based on any prohibited personnel practice described in 5 U.S.C. Section 2302(b). To establish that the agency has violated 5 U.S.C. Section 2302(b)(8), the appellant must demonstrate that he was engaged in a protec-

ted activity, that he was treated in an adverse fashion by the employer, and that there is a causal connection between the protected activity and the adverse action. Buercklin v. Department of the Air Force, 1 MSPB 375 (1980); In the Matter of Robert J. Frazier, Jr., 1 MSPB 159, 186 (1979). In order to show that he was engaged in a protected activity, the appellant must prove that he disclosed information which he reasonably believed evidences mismanagement, a gross waste of funds, an abuse of authority or a substantial and specific danger to public health and safety. 5 U.S. C. Section 2302(b)(8). He must go on to prove by a preponderance of the evidence that the disclosure was a substantial or motivating factor in the agency's action of suspending him. Monczewski v. Department of the Air Force, MSPB Docket No. DA07528110443 (July 1, 1982). After the appellant has shown that he was engaged in

protected conduct and that protected conduct was a motivating factor in the agency's action, the burden then shifts to the agency to prove by a preponderance of the evidence that it would have taken the same action even if the protected conduct had not taken place. Gerlach v. Federal Trade Commission MSPB Docket No. DC07528010020 (December 15, 1981). The first element for analysis is whether the appellant has proven by a preponderance of the evidence that he was engaged in a protected activity. In order for the appellant to prove a prima facie case of reprisal for whistleblowing he would have to show that he engaged in the protected activity of disclosing information which he reasonably believed evidenced mismanagement, abuse of authority, gross waste of funds or a substantial and specific danger to public health or safety. 5 U.S.C. Section 2302(b)(8). In Pickering v. Board of Education, 391 U.S. 563, 568 (1968) the court explained that conduct of

government employees is protected when after balancing the interests of the employee and employer, it is concluded that the employee's interests in speech outweighs the government's interest as an employer in efficient management. Pickering at 568.

After examining the serious allegations made by the appellant on January 18, 1982, and after considering the sincerity of his testimony on this issue, I find that the appellant's January 18, 1982 request for an investigation constituted activity protected by his First Amendment rights.

I will next examine whether his protected conduct constituted whistleblowing. Statements of mere disagreement with management policies and practices may be protected conduct, but such conduct is not necessarily whistleblowing. Whistleblowing requires the disclosure of information which the employee reasonably believes evidences wrongdoing. Prescott v. Department of Health and Human

Services 6 MSPB 216, 220 (1981). Here, the appellant disclosed that he believed management "blocked" what the appellant asserts was necessary training for Federal Protective Officers; took reprisal actions against the appellant; and abused the personnel system by using adverse actions to reduce personnel ceiling. Agency file, Tab 6.

It is undisputed that the appellant often publicly criticized GSA. His criticisms of the National Archives were known throughout the Federal Protective Service in Philadelphia. 3/ H.T. 141, 584, 603-606. However, the appellant's most recent criticism was of management of the Federal Protective Service. Specifically, the appellant testified that sometime prior to January 18, 1982,

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3/ National Archives and Federal Protective Service are both subagencies of GSA.

he wrote to the Administrator of GSA and reported "misuse of adverse action by Thompson and Hogan." H.T. 717. The Inspector General of GSA responded by inviting the appellant to inform him immediately regarding management irregularities in GSA Region III. H.T. 717. On January 18, 1982, the appellant submitted a request for investigation to the Inspector General and was interviewed shortly thereafter by the Office of the Inspector General, GSA Region III. Agency File, Tab 6; H.T. 717.

Mr. Thompson testified that he saw the report the appellant sent to the Inspector General, but could not recall when he first saw it. H.T. 588, 601. Mr. Thompson testified that he received a call from the Office of the Inspector General, Region III, about the appellant's January 18, 1982 allegations. H.T. 595, 598.

Mr. Thompson testified that he was not upset by the call. H.T. 599. He said: "I felt

that what was being alleged was totally fallacious, so I didn't regard it. I regarded it in that vein." H.T. 598. "I considered the source." H.T. 599. "Since I had nothing to hide, I wasn't worried about it." H.T. 599.

The appellant also wrote an editorial for the Federal Times which Mr. Thompson reviewed before he proposed the appellant's suspension. When questioned about the editorial, Mr. Thompson testified that he considered it an example of the appellant's attitude, which was "the attempt to be identified as a whistleblower." H.T. 601-602. Mr. Thompson also said that the appellant's editorial reflected dissatisfaction with the system, with the administration, with the agency, and with Congresswoman Patricia Schroeder. H.T. 602. Mr. Thompson indicated his disagreement with the appellant's contentions. H.T. 602.

Mr. Thompson verified that the appellant may

have also mentioned that he had made allegations against Mr. Thompson to the FBI and to Congress. H.T. 600. Mr. Thompson denied being worried about the allegations. H.T. 600. After examining the information in the appellant's request for investigation and upon considering the appellant's and Mr. Thompson's testimony, I find that the matters about which the appellant complained were serious enough if true, to outweigh the agency's determination that the appellant was simply "attempting to be identified as a whistleblower." While the appellant clearly disagreed with management's decisions, he went beyond disagreement, and disclosed specific incidents which he reasonably believed evidenced wrongdoing.

I find that the evidence shows that the appellant engaged in whistleblowing when he made allegations of management abuse to the Office of the Inspector General in January 1982. The next question is whether

the appellant established a causal connection. Whether a causal connection exists between the protected activity and appellant's suspension requires consideration of various factors. Valerino at 348. Those factors include: (1) the employee's reaction to the protected activity, (2) the closeness in time of the suspension to the protected activity, (3) the extent of the charges and disclosures forming the basis of the protected activity, (4) the seriousness of the charges, and (5) the time during which the matters raised by the charges and disclosures were left unresolved. Valerino at 348.

The record shows that the appellant filed a request for investigation with the Office of the Inspector General on January 18, 1982. In his request he alleged that John MacDonald, Chief, Programs and Support Services Branch, had taken a whole series of reprisal actions against the appellant. Agency File, Tab 6. Two weeks earlier, on January 6, 1982, the

appellant was given an official warning notice for failure to follow proper procedures in requesting leave and absence without leave. Agency File, Tab 7. The warning was signed by John MacDonald, Chief, Programs and Support Services Branch. Also on January 6, 1982, the Field Inspections Office of the Office of the Inspector General issued a report of investigation into allegations of the appellant's misconduct. Agency File, Tab 8. The report stated that the appellant had "obtained the social security number (SSN) of a GSA employee and furnished that information to another GSA employee for the purpose of gaining personal information about the employee. He denied giving the SSN to anyone, but admitted making statements of a defamatory nature about a GSA employee." Agency File, Tab 8. The person whose social security number was in issue is John MacDonald. Agency File, Tab 8.

On January 20, 1982 Mr. MacDonald issued the appellant a record of infraction for reproducing and/or distributing training bulletins without first submitting them for review and approval. Agency File, Tab 9. The appellant responded to both the warning notice and the record of infraction (regarding the bulletins) by charging that they were retaliatory. Agency File, Tabs 7 and 9.

On January 22, 1982, Mr. MacDonald issued the appellant notice of proposed suspension for deliberate refusal to comply with authorized instructions issued by a supervisor. Agency File, Tab 13.

The facts of this incident are that Mr. MacDonald requested the appellant to prepare a training nomination. The appellant refused to prepare the nomination because the appellant believed to do so would have been improper. Agency File, Tab 13. Before the suspension became effective, a disciplinary panel was convened to determine whether there

is "1) enough material for a removal action based on sufficient acts of misconduct and 2) does management have an obligation to send Charles Thomas for a Fitness-for-Duty examination?" Agency File, Tab 10. The panel determined that it had enough material on which to base a removal, but recognizing its duty to initiate disability retirement for the appellant, would proceed with a Fitness-for-Duty examination. Agency File, Tab 10. The appellant was indefinitely suspended by Mr. Valerie who apparently based his decision solely on the recommendation he received from John Thompson. H.T. 402.

After examining the cross fire between the appellant and GSA, it is apparent that there was mutual friction. The agency receives an IG report on alleged misconduct by the appellant, then the appellant requested that the IG investigate the agency's alleged misconduct. Then, in quick succession, the

appellant is disciplined for three separate infractions. The proposing official, one of the persons named in the appellant's correspondence recommended indefinite suspension and the deciding official concurred in the recommendation. The sequence of events is suspenct but, there is no evidence of record other than the appellant's allegations, to show that the agency manufactured the disciplinary actions to cover a retaliatory intent. I find that the appellant failed to establish by a preponderance of the evidence that retaliation was the motive for the indefinite suspension.

In summary, I find that the agency has failed to prove that the indefinite suspension of the appellant promotes the efficiency of the service. I also find that the appellant failed to establish reprisal for whistleblowing as the motive for his indefinite suspension.

DECISION

The agency's decision to indefinitely suspend the appellant pending decision on the agency-filed disability application is reversed. The agency is ordered to return the appellant to his position.

NOTICE

This is an initial decision. It will become a final decision of the Merit Systems Protection Board on 20 May 1983 unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to this appeal, the Director of the Office of Personnel Management, or the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The petition for review must set forth specific objections to the initial decision, supported by references to applicable laws or regulation, and with specific reference to the record.

The petition for review must be filed with the Secretary to the Merit Systems Protection Board, Washington, D.C. 20419, no later than the date set forth above.

After providing an opportunity for response by other parties, the Board may grant a petition for review when it is established that:

(1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(2) The decision of the Presiding Official is based on an erroneous interpretation of statute or regulation.

The appellant has the right to petition the Equal Employment Opportunity Commission to consider the Board's final decision on the issue of discrimination, either when this initial decision becomes final on the date set forth above or after final Board action

when appellant has petitioned the Board for review or the Board has reopened the case on its own motion. The appellant may file a civil action in court without either petitioning the EEOC or the Board or after either body has rendered a final administrative decision. Either a petition or a civil action may be filed, but not both, no later than 30 days after the Board's decision has become final. Appellants who choose to file an action in a district court also have the right to request the court to appoint a lawyer to represent them, and to request that prepayment of fees, costs, or security be waived.

Except for actions filed under the anti-discrimination laws, the appellant has the right to seek judicial review of the Board's final decision on this appeal pursuant to 5 U.S.C. Section 7703(b)(1). A petition requesting such review must be filed with the United States Court of Appeals for the Federal

Circuit no later than thirty (30) days after receipt of the Board's final decision or order.

REPORT OF COMPLIANCE

The appropriate administrative officer of the agency is requested to furnish documentation of the required corrective action within five (5) days after the date the initial decision becomes final, assuming the appeal is not opened on petition by either party or an intervenor. Such documentation should be sent to the Regional Director, Philadelphia Regional Office, Merit Systems Protection Board, Room 501, U.S. Customhouse, 2nd and Chestnut Streets, Philadelphia, Pennsylvania 19106, unless a petition for review of this initial decision is granted.

For the Board:

/s/ Eve Montgomery
Eve Montgomery
Presiding Official

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution

U.S. Const. amend. V:

No person shall be . . . deprived of life, liberty, or property, without due process of law; . . . .

Statutes

5 U.S.C. § 2302(b):

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority -

. . .

(8) take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for -

(A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences -

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) a disclosure to the Special Counsel of the Merit Systems Protection Board, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences -

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) take or fail to take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any appeal right granted by any law, rule, or regulation;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States; or

(11) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title. . . .

5 U.S.C. § 5596(b)(1):

> An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee -
>
> (A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect -
>
> (i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; . . . .

5 U.S.C. § 7513(b):

> An employee against whom an action is proposed is entitled to -
>
> (1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprison-

ment may be imposed, stating the specific reasons for the proposed action;
(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;
(3) be represented by an attorney or other representative; and
(4) a written decision and the specific reasons therefor at the earliest practicable date.

5 U.S.C. § 7701

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right -
(1) to a hearing for which a transcript will be kept; and
(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

. . .

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision -
(A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment -

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

5 U.S.C. § 7703

(a) (1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be the named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision issued by the Board under section 7701. In review of a final order or decision issued under section 7701, the agency responsible for taking the action appealed to the Board shall be the named respondent.

(b) (1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit.

> Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.
> . . .

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be -

> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (2) obtained without procedures required by law, rule, or regulation having been followed; or
> (3) unsupported by substantial evidence; . . . .

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-14

In the Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. THOMAS, PETITIONER

v.

GENERAL SERVICES ADMINISTRATION AND
MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly relied on the Merit Systems Protection Board's findings of fact, where the Board proceeded on an erroneous jurisdictional theory, but in doing so engaged in precisely the same factfinding required to sustain its conclusions under the correct theory of jurisdiction.

2. Whether the court of appeals correctly held that the Merit Systems Protection Board's findings were supported by substantial evidence.

3. Whether petitioner is entitled to an award of backpay for the period during which he was suspended without pay, where the suspension was found to be fully justified.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 756 F.2d 86. The opinion and order of the Merit Systems Protection Board (Pet. App. 21a-38a) is unofficially reported at 84 F.M.S.R. ¶ 5391.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1985. A petition for rehearing was denied on April 5, 1985 (Pet. App. 19a-20a). The petition for a writ of certiorari was filed on July 2, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In March 1980, petitioner Charles A. Thomas began work as a training specialist for the Federal Protective Service (FPS), a division of the General Services Administration (GSA). When petitioner began to engage in bizarre and disruptive behavior, GSA ordered him to undergo a psychiatric fitness-for-duty examination. The examination, which was conducted in March and April 1982, disclosed that petitioner was suffering from a paranoid personality disorder. Petitioner was then placed on involuntary sick leave. Pet. App. 2a-4a.

On May 27, 1982, GSA notified petitioner that he was to be placed on indefinite suspension while the agency decided whether to apply for disability retirement on his behalf. The suspension was predicated on the adverse impact petitioner's behavior had on productivity and morale. Petitioner had, for example, frequently used a realistic replica of a .45 caliber pistol to practice marksmanship at the office, he exhibited a preoccupation with the martial arts (including demonstrations on vending machines), made revolutionary statements, constantly stared at others, provoked arguments and, while slashing a cardboard box with a pair of scissors, commented that "even this is too good for her." Pet. App. 3a-4a, 23a.

GSA proceeded with a disability retirement application. In a letter dated June 24, 1982, petitioner was notified that, as of June 29, 1982, he was being suspended indefinitely while the retirement application was pending before the Office of Personnel Management (OPM). Pet. App. 44a. The present case arises from petitioner's appeal of that suspension.[1]

---

[1]Petitioner was later removed from his position. That removal is not involved in this proceeding. Pet. App. 2a n.1, 6a n.2.

2. Initially, petitioner appealed to the Merit Systems Protection Board (MSPB or Board). On April 15, 1983, the Board's presiding official rejected petitioner's claim that he had been suspended for being a "whistle-blower"; nevertheless, GSA's decision was reversed because the agency had not proved that the suspension promoted the efficiency of the service. Pet. App. 81a. Both parties appealed to the full Board. The Board reviewed the case in detail and concluded that (*id.* at 35a-36a):

> the cumulative effect of the evidence, especially the psychiatric fitness-for-duty report, establishes that [petitioner] was not ready, willing, and able to perform the duties of his position because of his mental condition during the period in question. The record is replete with ample, corroborated evidence warranting the agency action placing [petitioner] in enforced leave without pay status in order to remove him from the workplace. [Petitioner] was a disruptive, threatening force in the workplace and his behavior was frightening to his co-workers. Accordingly, we find that [petitioner] was unable to perform his duties in the structure of the workplace without constituting a threat to the well-being of his co-workers. The presiding official's contrary findings were erroneous and are reversed.

Because the Board also concluded that its authority was limited to appeals from disciplinary suspensions of persons who are "ready, willing, and able" to work, and the facts supported the finding that petitioner was not "able," the Board therefore held that it lacked jurisdiction. *Id.* at 30a-31a, 36a-37a.

3. The court of appeals reversed the MSPB on the jurisdictional issue, but, based on the Board's findings of fact, upheld the agency's suspension action. The Federal Circuit

pointed out (Pet. App. 15a-16a) that the Board had thoroughly reviewed the record, that the Board's evaluation of the propriety of petitioner's remaining on active duty was well within its competence (*id.* at 17a), and that its findings and conclusions were supported by substantial evidence on the record as a whole (*ibid.*). Because these findings and conclusions resolved all issues necessary to deciding the case, "[t]here is no need for a further determination" of facts (*id.* at 16a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The factbound questions it presents do not warrant further review.

1. Petitioner contends (Pet. 16-22) that because the decision of the MSPB was nominally based on jurisdictional grounds, the Board "did not * * * determine whether the preponderance of the evidence supported GSA's claims" (*id.* at 16-17). This argument is without merit.

As is clear from the opinions of the Board and the court of appeals, the Board's legal conclusion that it lacked jurisdiction was premised on the same findings of fact that would be called for in deciding the case on the merits. The MSPB construed the term "suspension," as defined at 5 U.S.C. 7501(2), to be limited to disciplinary-type situations in which the employee is "able" or "fit" to perform all of the duties of his position. Pet. App. 28a-31a. Consistent with this interpretation, the Board viewed itself as having jurisdiction over strictly "disciplinary" suspensions but not over suspensions imposed because the employee's health made him unfit. In order to resolve this jurisdictional issue, the Board had to determine the threshold question whether petitioner was in fact able to perform his duties. After reviewing the entire record (see *id.* at 29a-35a), the Board

concluded that "the cumulative effect of the evidence * * * establishes that [petitioner] was not ready, willing, and able to perform the duties of his position because of his mental condition during the period in question." *Id.* at 35a-36a.

The Federal Circuit held that the MSPB's jurisdictional theory was incorrect and that the Board has jurisdiction over all cases involving suspensions based on disruptive conduct (Pet. App. 9a): "We hold that GSA's action in this case falls within the jurisdiction of the MSPB, whether that action be deemed taken for purely disciplinary motives (in the sense of punishment) *or* whether it was taken because it was necessary in order to place petitioner apart from his fellow workers during the period until the disability application could be acted upon by OPM." As the court of appeals noted, this holding in no way altered the Board's express finding that the agency had properly suspended petitioner because of his "disruptive" and "threatening" conduct at the FPS office. See Pet. App. 9a (quoting *id.* at 33a, 36a). That finding would dispose of the case under either the jurisdictional theory adopted by the court of appeals or the theory adopted by the Board. Accordingly, the court of appeals saw no reason to remand for the Board to duplicate its prior factual findings. That sensible decision does not warrant review by this Court.[2]

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[2]There is no merit to petitioner's contention (Pet. 17-20) that he was suspended in retaliation for being a "whistleblower." The MSPB's initial decision expressly found (Pet. App. 81a) that "there is no evidence of record other than [petitioner's] allegations, to show that the agency manufactured the disciplinary actions to cover a retaliatory intent." This Court need not detain itself considering an allegation for which the record furnishes "no evidence."

Nor is there merit to petitioner's claim that he was denied procedural rights under 5 U.S.C. 7701(c)(2)(A) because the notice of suspension lacked the "specificity" required by 5 U.S.C. 7513(b)(1). Pet. 18-19. Section 7513(b)(1) merely indicates that an employee against whom an

2. Petitioner contends (Pet. 22-26) that the court of appeals erred in holding that the MSPB's decision was supported by substantial evidence. As the court below noted (Pet. App. 15a-17a), however, the Board's opinion refers expressly to more than enough relevant evidence to allow a reasonable mind to accept its findings of fact. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477 (1951). The evidence included the fitness-for-duty report of the psychiatrist petitioner himself had chosen (see Pet. App. 16a), testimony and a memorandum from Sara McColgan (Chief of the Program and Support Services Branch), who had counseled petitioner about his behavior problems at the workplace, a memorandum from John Ramos (a GSA supervisor), and live testimony from Nancy Zawadsky (a secretary at the office where petitioner worked). Pet. App. 31a-35a. The non-psychiatric evidence, which was presented to the Board as "illustrative" of petitioner's inappropriate, disruptive, and threatening behavior in the workplace (*id.* at 32a-33a), is by itself sufficient to meet the substantial evidence standard. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. at 477. When the psychiatrist's report, which also would alone constitute substantial evidence (see *Richardson* v. *Perales*, 402 U.S. 389, 402 (1971)), is added, the requisite showing is exceeded by a wide margin.[3]

---

action is proposed is entitled to "at least 30 days' advance written notice," which petitioner certainly received. Furthermore, any "specificity" requirement that might be implied would easily be satisfied by the detailed letter (see Pet. App. 23a) that was sent to petitioner before his suspension. In any event, Section 7701(c)(2)(A) employs a harmful error standard, and petitioner has not alleged any respect in which he was handicapped in challenging the agency's action by the supposed lack of "specificity" in the pre-suspension letter.

[3]There is no merit to petitioner's contention (Pet. 22-23) that hearsay is inadmissible at MSPB hearings. See *Richardson* v. *Perales*, 402 U.S. at 402. Nor is petitioner on firmer ground in suggesting (Pet. 23) that because the Board "relied almost exclusively on hearsay" it violated a rule against relying *exclusively* on hearsay (*id.* at 24). As this Court

3. Finally, petitioner contends (Pet. 26-29) that he should be awarded backpay, under 5 U.S.C. 5596(b), for the time during which the challenged suspension was in effect. The statute limits awards of backpay to situations in which an employee is "found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action * * *." Petitioner is accordingly not entitled to an award of backpay because no "appropriate authority" found that his suspension was in any way unjustified or unwarranted. Both the MSPB and the Federal Circuit made findings that support the conclusion that petitioner's suspension was fully justified and warranted.

Petitioner relies solely on OPM's denial of the application for disability retirement that GSA had filed on his behalf. See Pet. 26-27. From this, petitioner argues that the "effect" of OPM's ruling is that GSA was "mistaken" in believing that he suffered from a psychiatric disability. *Id.* at 28. The only "effect" of OPM's ruling, however, is that petitioner is not entitled to the benefits of the Civil Service Retirement Act. This is a completely separate question from whether the agency was justified in suspending petitioner from his job, a question on which OPM did not pass. Cf. *Piccone* v. *United States*, 407 F.2d 866, 872 (Ct. Cl. 1969).[4]

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stated in *Richardson* v. *Perales*, 402 U.S. at 407-408, this argument is derived from a misreading of *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 230 (1938).

[4]Petitioner is incorrect in claiming (Pet. 28-29) that a conflict exists in the lower courts on the backpay issue. *Brown* v. *Department of Justice*, 715 F.2d 662 (D.C. Cir. 1983), was a case in which an agency suspended an employee solely because the employee had been indicted on criminal charges; the court held that if the employee was later acquitted on those charges, the agency must either dismiss him and justify that dismissal by a preponderance of the evidence or reinstate him with backpay. In the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

AUGUST 1985

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present case, petitioner was in fact dismissed after OPM denied the application for disability retirement. See Pet. App. 2a n.1, 6a n.2. The other two cases on which petitioner relies (*Seebach* v. *United States*, 182 Ct. Cl. 342 (1968) and *Kleinfelter* v. *United States*, 318 F.2d 929 (Ct. Cl. 1963)) have been rejected by the same court that decided them. See *Piccone* v. *United States*, 407 F.2d at 872 & n.13.